

jeanette Monos



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Controlotron Corporation

File: B-266006

Date: September 22, 1995

DECISION

Controlotron Corporation protests the rejection of its proposal by DynMcDermott Petroleum Operations Company under request for proposals Nos. KEL-95-037, FP-95-083, and FP-95-036, acting as a management & operating contractor (M&O) for the Department of Energy (DOE).

We dismiss the protest.

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 *et seq.* (1988), authorizes us to resolve bid protests concerning solicitations issued by federal contracting agencies. We have interpreted the Act to authorize our review of subcontract awards where, as a result of the government's involvement in the award process or due to the contractual relationship between the prime contractor and the government, the subcontract is in effect awarded on behalf of the government. 4 C.F.R. § 21.3(m)(10); Edison Chouest Offshore, Inc.; Polar Marine Partners, B-230121.2; B-230121.3, May 19, 1988, 88-1 CPD ¶ 477. Pursuant to this interpretation, we have traditionally reviewed procurements by prime contractors operating and managing DOE facilities, measuring the propriety of their actions against the terms of their prime contracts, their own-agency approved procedures, and the "federal norm." See Maxwell Laboratories, Inc., B-253737, Oct. 19, 1993, 93-2 CPD ¶ 239; United Telephone Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374, *aff'd*, Dept. of Energy-Recon. et al., B-246977.2 *et al.*, July 14, 1992, 92-2 CPD ¶ 20.

However, this review role was called into question by U.S. West Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991), which held that under CICA the General Services Administration Board of Contract Appeals does not have jurisdiction over protests of subcontract awards. Construing statutory language basically identical to that applicable to the General Accounting Office, the court held that the Board was not empowered to hear a protest of a procurement conducted by a DOE M&O contractor because the procurement was not a federal agency procurement. We subsequently declined to rule on a challenge to our protest jurisdiction in this area, pointing out that we would consider the protest ir

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any event because the DOE Acquisition Regulation (DEAR), 48 C.F.R. § 970.7107 (1994), provided for our review of such protests. See AT&T, B-250516.3, Mar. 30, 1993, 93-1 CPD ¶ 276. DOE has now revised its regulations, eliminating requirements for applying the "federal norm" standard to M&O procurements and further eliminating the language providing for our review of its M&O contractor procurement protests. See 60 Fed. Reg. 28737 (1995). The revisions became effective on June 2, 1995.


Meanwhile, on January 31, 1995, we issued proposed revisions to our Bid Protest Regulations. See 60 Fed. Reg. 5871 (1995). The proposed revisions eliminate the current regulatory language in 4 C.F.R. § 21.3(m)(10) regarding our review of subcontractor awards and provide instead for our review of subcontract protests only where we are requested in writing by the federal agency involved to do so. See 60 Fed. Reg. 5871, proposed section 21.5(h). We explained that in light of the U.S. West decision and the absence of any language in the recently-enacted Federal Acquisition Streamlining Act of 1994, Pub. Law. 103-355, Oct. 13, 1994, addressing the matter, we considered it appropriate to treat subcontract award protests as "non-statutory," that is, subject to our review upon the request of the federal agency awarding the prime contract.

Our revised Regulations have now been issued in final form. See 60 Fed. Reg. 40737 (to be codified at 4 C.F.R. Part 21). Moreover, since DOE's regulations no longer provide for our review of M&O contractor procurements, and since DOE has not otherwise requested our review, we have discontinued our practice of reviewing under CICA protests of procurements by DOE M&O prime contractors, see Geo-Centers, Inc., B-261716, June 29, 1995, 95-2 CPD ¶ ___, and other procurements allegedly conducted "for" the government. Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ ___. As we have recognized in Compugen, we may entertain protests of procurements that are "by" the government. However, we will only review such allegations where the government agency's involvement is so pervasive that the prime contractor is merely a conduit for the government. Kerr-McGee Chem. Corp.-Recon., B-252979.2, Aug. 25, 1993, 93-2 CPD ¶ 120; ToxCo, Inc., 68 Comp. Gen. 635 (1989), 89-2 CPD ¶ 170.

The protester alleges that this procurement is "by" the government because it was DOE that decided to change to the use of flowmeters and that "key technical decisions regarding . . . flowmeters" were retained by DOE. The fact that the agency prepared, or assisted in the preparation of, the specifications does not establish pervasive involvement. See Perkin-Elmer Corp.-Metro Div., B-237076, Dec. 28, 1989, 89-2 CPD ¶ 604. In other words, an agency's active involvement in the subcontracting process is not sufficient--the agency must virtually take over the

subcontract award process, controlling the actual evaluation and other elements of the process, as occurred in St. Mary's Hosp. & Medical Ctr. of San Francisco, CA, 70 Comp. Gen. 567 (1991), 91-1 CPD ¶ 579 and University of MI; Indus. Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. The asserted involvement of the agency here is simply insufficient to meet this test.

- Accordingly, the protest is dismissed.


Ronald Berger
Associate General Counsel